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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HON. JOHN F. GRADY, *et al.*
Petitioners,

v.

RHONE-POULENC RORER INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This is a class action on behalf of thousands of persons with hemophilia (and representatives of deceased persons) who have been infected with the AIDS virus as a result of their use of blood plasma derived products manufactured by four of the defendants. Following the district court's conditional certification of a class for the limited purpose of adjudicating common issues of negligence and breach of fiduciary duty, the court below granted a writ of mandamus ordering the district court to decertify the class. The questions presented are:

1. Did the court of appeals err in holding that a writ of mandamus should issue to review the conditional class certification decision of the district court?

2. If a writ of mandamus was available for this purpose, did the court of appeals err in ordering the district court to decertify the class?

LIST OF PARTIES

Petitioners are the Honorable John F. Grady (the United States District Judge to whom the writ of mandamus issued by the court below is directed) and the named plaintiff class representatives.

The named class representatives are: Jonathan Wadleigh and Joanne Wadleigh; Dana Kuhn; Thomas Fahey and Frances Fahey; Joseph and Rachel Walker, parents and guardians of Mitchell Walker; Walter Erickson and Maria Erickson; Susan Collins, individually and as representative of the Estate of Robert Collins; Jack Stevens and Linda Stevens, parents and guardians of Jeffrey Stevens; Larry Burr and Juanita Burr, parents and representatives of the Estate of Michael Ryan Burr; Samuel and Joanne Thomas, administrators of the Estate of Matthew Thomas; Charles and Constance Turner, parents and guardians of Christopher Turner; Linda Lewis and Jerry L. Lewis, parents and guardians of Jerry Grant Lewis; and Martha Dougherty, guardian *ad litem* of Timothy Dougherty, all representatives of the class certified by Judge Grady and parties to the proceedings below on behalf of the class. (For reasons of confidentiality, certain parties are identified by pseudonyms).

Respondents (defendants in the class action in the district court and petitioners for mandamus in the court below) are four manufacturers of blood plasma-derived products: Armour Pharmaceutical Corporation, and its parent, Rhone-Poulenc Rorer, Incorporated; Miles Incorporated; Baxter Healthcare Corporation; and Alpha Therapeutic Corporation.

The National Hemophilia Foundation is an additional respondent. The Foundation (a defendant in the district court) took no part in the mandamus proceeding below.

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, Honorable John F. Grady, et al., respectfully pray that a writ of certiorari issue to review the

judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Pet. App. 1a-30a) is reported at 51 F.3d 1293.

The opinion of the United States District Court for the Northern District of Illinois (Pet. App. 34a-62a) is reported at 157 F.R.D. 410.

STATEMENT OF JURISDICTION

Respondents initiated this proceeding in the Court of Appeals for the Seventh Circuit under the All Writs Act, 28 U.S.C. § 1651.

The Court of Appeals entered judgment on March 16, 1995. A petition for rehearing and suggestion for rehearing *en banc* was denied on April 27, 1995. Pet. App. 65a-66a.

Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

The statutory provisions involved in this case are 28 U.S.C. §§ 1291, 1293, and 1651. Pet. App. 200a-203a. The Federal Rule of Civil Procedure is Rule 23. Pet. App. 204a.

STATEMENT OF THE CASE

Petitioners seek review of a judgment of the court below granting a writ of mandamus. The writ directed petitioner, the Honorable John F. Grady, to decertify a class which had been conditionally certified to adjudicate common issues.

Approximately forty percent of the 20,000 persons in this country with hemophilia have been infected with HIV (human

immunodeficiency virus) transmitted to them by blood plasma-derived products (antihemophiliac factor concentrate, "AHF"). HIV causes the Acquired Immune Deficiency Syndrome ("AIDS"). More than 2,000 persons with hemophilia already have died of AIDS.[1]

In September, 1993, a class action complaint was filed in the Northern District of Illinois on behalf of persons infected with HIV from AHF manufactured by four of the defendants. The case was assigned to the Honorable John F. Grady.[2] The complaint alleges, *inter alia*, that class members' infection with the AIDS virus resulted from defendant manufacturers' negligence.[3]

The class action before Judge Grady has been consolidated with about 130 federal court cases transferred to the Northern District of Illinois by the Judicial Panel on Multidistrict Litigation, designated as MDL-986. In transferring the cases, the Multidistrict Panel found that there were "common questions of fact" among blood-factor concentrate contamination cases then pending in several federal courts.[4]

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[1] Hemophilia is an hereditary disorder passed from mothers to their sons. Persons with hemophilia do not have sufficient Factor VIII or IX for normal coagulation of blood.

AHF supplements Factors VIII and IX to prevent or control bleeding episodes in persons with hemophilia. AHF is derived from the pooled plasma of thousands of paid commercial plasma donors. Complaint, para. 29-32. The manufacturing process is known as "fractionating." The manufacturers are typically described as "fractionators."

[2] *Wadleigh, et al. v. Rhone-Poulenc Rorer, Inc., et al.*, 93 C 5969 (N.D. Ill.).

[3] The complaint also alleges strict liability in tort, breach of implied warranty, and concert of action/conspiracy. The complaint asserts a claim for relief against the National Hemophilia Foundation based on breach of fiduciary responsibilities.

[4] *In re "Factor VIII or IX Concentrate Blood Products" Prods. Liab. Litig.*, 853 F.Supp. 454 (J.P.M.L. 1993).

On August 17, 1994, after more than ten months of pretrial activity, the district court ruled on plaintiffs' motion for class certification. Pet. App. 34a-62a. The court found that the motion satisfied all elements of Fed. R. Civ. P. 23(a). Pet. App. 37a-43a. The district court, in a thorough analysis of the issues, concluded that it was appropriate, under Rule 23(c)(4)(A), to permit the class action to be maintained with respect to two issues: the manufacturers' breach of duty of care and the National Hemophilia Foundation's breach of fiduciary duty.[5] (Pet. App. 43a-60a).

In conditionally certifying the issue of the manufacturers' breach of duty as a common question, the district court was aware that the governing law, in a diversity action, would be state law. The court concluded that "the definition of ordinary negligence is substantially identical in all jurisdictions." (Pet. App. 46a-47a)[6] More specific "instructions pertaining to the customary or professional standard of care [could be drafted] in equally general terms applicable to all jurisdictions where the defendants' duties would be measured by such a standard." Pet. App. 57a.[7] In the district court's view, "fact questions as to what was known in the relevant scientific community at various times, and the efficacy of what the fractionators were doing at various times, are common [to members of the class]." Pet. App. 49a.

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[5] The district court declined to certify issues of proximate cause, strict liability, or breach of implied warranty, because of its view that case specific issues predominated. Pet. App. 49a-53a, 60a-61a.

[6] The court found that the manufacturers had provided no examples of differing definitions of ordinary negligence among the laws of the states. Pet. App. 46a-48a, 56a.

[7] The court noted that, in a case like this, some states might apply a "professional standard of care" (defined mainly by what other professionals were doing at the time), while other states use a standard of "ordinary" care (the reasonable person standard). The court concluded that it would be feasible to submit the case to a jury under appropriate instructions based on these two standards. Pet. App. 44a-49a, 57a-58a.

The court determined that its planned course of proceeding was both feasible and useful:

> The result would be the return of a verdict that would be useable for or against the defendants in jurisdictions throughout the country. If, for instance, a particular defendant were found not guilty of ordinary negligence and not to have violated any professional standard of care, that defendant would be absolved of any liability to any of the class members on a negligence theory. On the other hand, if a defendant is found to have been negligent in a particular respect after a particular date, that defendant would be subject to further prosecution by any class member who might attempt to prove that his HIV infection occurred as a result of using contaminated concentrate distributed by the defendant after that date. (Pet. App. 59a).

The district court, relying in part on its own experience in a six-week trial of an individual claim by an HIV-infected person with hemophilia, rejected the alternative of a multiplicity of repetitive trials of identical issues:

> All defendants have to offer is a succession of separate trials in the various jurisdictions, litigating over and over again the same questions.... Defendants want to do it repeatedly, before jury after jury, with the same witnesses monotonously repeating the testimony they have given many times before. (Pet. App. 59a-60a).

Accordingly, the court ordered certification of the class pursuant to Rule 23(b)(2) and 23(c)(4)(A). The court declared that a Rule 23(b)(3) and 23(c)(4)(A) certification of the issue of manufacturers' negligence was appropriate and clearly superior to any other available method for the fair and efficient adjudication of the controversy. Pet. App. 60a

The manufacturers sought an immediate appeal pursuant to 28 U.S.C. § 1292(b). The district court refused:

> [C]learly a reviewing court would be in a better position to assess the efficiency and fairness of a trial after it has taken place rather than before.... [T]he class trial, offering a possible alternative to the hundreds, if not thousands of individual trials proposed by the defendants ... will require a minute expenditure of time in comparison to what must occur if there is no class certification. Rather than asking a reviewing court to determine in advance that it will or will not work, the trial should be held and the result evaluated in light of the actual experience. (Pet. App. 64a).

Based on the August 17 Opinion, the district court issued Order No. 5, the Class Certification Order, on November 3, 1994. Pet. App. 31a-33a.

On December 19, four months after the Opinion and with pre-trial discovery actively underway,[8] the manufacturers filed a petition for a writ of mandamus in the Seventh Circuit. Pet. App. 67a-115a. During oral argument, the appellate court asked for further information regarding the district court's trial plan. Subsequently, Judge Grady wrote a letter to counsel about his tentative trial plan, which was forwarded by class counsel to the court of appeals. Pet. App. 165a-168a. On March 16, 1995, a majority of the panel (Chief Judge Posner, Circuit Judge Bauer) granted the writ of mandamus and ordered decertification of the class. Pet. App. 1a-22a.[9] The third member of the panel (Circuit Judge Rovner) dissented. Pet. App. 22a-30a.

The writ of mandamus was based principally upon an admitted chain of "guesses" by the majority that the defendants

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[8] In fact, the District Court had already specially listed the class action to be tried to verdict and final judgment. The trial was to begin on October 2, 1995. Pet. App. 167a.

[9] The majority accepted Judge Grady's letter as a brief from a respondent to the mandamus proceeding. Pet. App. 8a.

would face settlement pressure (Pet. App. 9a-10a). The majority speculated that if the class action trial proceeded, it might result in a plaintiffs' verdict on the basis of which defendants might have to pay a total of $25 billion (the court below "guessed" that 5,000 class members might receive $5 million each). Pet. App. 9a-10a. In contrast, the majority speculated that if there were no class action, but instead hundreds of individual trials, defendants might have to pay only $125 million. Pet. App. 9a. The majority also conjectured that defendants "might not be confident that the defenses would prevail" in a class action trial; that a plaintiffs' verdict "might easily" cause "bankruptcy" to defendants; that defendants "may not wish to roll these dice" of a trial, and would therefore settle the class action before trial--a potential "blackmail" settlement. Pet. App. 10a.

No defendant had asserted in the mandamus petition the basis upon which the Seventh Circuit issued its order. There was no record basis whatsoever for the $25 billion figure at which the majority "guessed." In fact, in their public SEC filings, defendants had denied that the class action litigation would have any materially adverse financial impact.[10]

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[10] In its 10Q statement to the SEC, defendant Baxter stated:

> "[I]f the Company, along with the other defendants, enters into a comprehensive settlement of the class actions described above, the Company may incur charges in excess of presently established reserves. While such a future charge could have a material adverse impact on the Company's net income in the period in which it is recorded, management believes that *any outcome of this litigation will not have a material adverse effect on the Company's consolidated financial position.*" Baxter 10Q, 11/15/94, p. 21. (emphasis added)

Defendant Rhone-Poulenc, filing on behalf of itself and its wholly-owned subsidiary defendant Armour, similarly wrote in its 10Q:

> "Based on information available, the Company does not believe that reasonably possible uninsured losses in excess of amounts recorded for the above matters of litigation would have a material adverse impact on the Company's financial position or results of

A petition for rehearing and suggestion for rehearing *en banc* was denied by a vote of five to three with one judge abstaining. Pet. App. 65a-66a.

REASONS FOR GRANTING THE WRIT

The decision below deserves plenary consideration by this Court for two basic reasons. First, by engaging in an unwarranted and unprecedented "cost-benefit" analysis and by undertaking a premature and speculative analysis of other issues, the majority of the court below has violated the precepts laid down by this Court for the limited availability of the writ of mandamus as a technique of interlocutory appellate review and, in doing so, has brought itself into conflict with other circuits.

Second, after erroneously determining that review on mandamus was available, the majority below once again violated precepts of this Court by ordering the district judge to decertify the class. In doing so, the court below has not only brought itself into conflict with other circuits that have upheld similar certifications, but has threatened the viability of the class action as one of the most promising tools available to district courts for the just and efficient resolution of complex multi-party disputes.

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operation." Rhone-Poulenc 10Q, 11/15/94, p. 15.

I. THE SEVENTH CIRCUIT'S DECISION TO ENTERTAIN THE PETITION FOR MANDAMUS CONFLICTS WITH DECISIONS OF THIS COURT AND IMPERILS ESTABLISHED RULES AND POLICIES LIMITING THE AVAILABILITY AND TIMING OF APPELLATE REVIEW.

This Court has carefully defined the scope of the writ of mandamus and instructed courts of appeals in proper use of this extraordinary writ. This Court, on several occasions, has corrected the tendency of some courts of appeals to expand mandamus beyond its appropriate boundaries. In the present case, the Seventh Circuit's sharp departure from this Court's precepts calls urgently for reaffirmation of those precepts to ensure that the writ of mandamus is confined to its proper place.

Two principles have been laid down by this Court on the scope of the power of federal courts of appeals to entertain petitions for mandamus. The first fixes mandamus in the broader context of appellate jurisdiction. Mandamus proceedings are original actions in courts of appeals under the All Writs Act, 28 U.S.C. § 1651, but, as that Act specifically provides, courts of appeals may consider mandamus only in aid of their appellate jurisdiction. With the limited exception of interlocutory appeals authorized by 28 U.S.C. § 1292, courts of appeals' appellate jurisdiction is limited to *final* judgments of district courts. 28 U.S.C. § 1291. This final judgment rule is not merely technical. It embodies a fundamental policy of sound judicial administration that is opposed to piecemeal appellate litigation. This Court has repeatedly held that actions for mandamus may be resorted to only when there is compelling reason for an appellate court, in aid of its jurisdiction, to intervene in district court proceedings before final judgment in those courts. See, e.g., *Roche v. Evaporated*

Milk Ass'n, 319 U.S. 21 (1943); *Kerr v. United States District Court*, 426 U.S. 394 (1976).

The second principle, equally fundamental, defines the limited circumstances in which it may be proper for a court of appeals to intervene before final judgment. Mandamus is available to confine a district court to its prescribed jurisdiction or to compel a district court to exercise its authority when it is its duty to do so. This Court has not used an unduly technical definition of "jurisdiction." What matters is whether a district court's actions may constitute a usurpation of judicial authority. If so, a court of appeals may grant mandamus to direct the district court to act within the scope of that authority.[11]

The critical aspect in this element of the law of mandamus is not whether a district court has committed an error. It is whether the court has entered an order of a kind that is not within the court's judicial power to make at all. On matters within their jurisdiction, district judges may make many decisions that are right and some that are wrong. Review for error, even serious error, is timely only after final judgment.

The now classic formulation of this second principle of mandamus law appears in numerous opinions of this Court. Though familiar, the critical language of this Court bears brief rehearsal here. In *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943), the principle was stated in these words:

> The traditional use of the writ in aid of appellate jurisdiction ... has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or compel it to exercise its authority when it is its duty to do so.... Even in such cases appellate courts are

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[11] Even when a district court has acted beyond its jurisdiction or made a ruling that was not within its judicial power, under the teachings of this Court the mandamus remedy is not appropriate if the trial court's error can be reviewed after final judgment.

> reluctant to interfere with the decision on jurisdictional questions which it is competent to decide and which are reviewable in the regular course of appeal.

This Court restated the principle in *Will v. United States*, 389 U.S. 90, 95 (1967), where it reversed a Seventh Circuit decision granting mandamus, and, more recently, in *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980), where it summarily reversed a court of appeals' judgment granting a writ of mandamus:

> Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary writ.

For essentially the same reasons, this Court reversed another Seventh Circuit judgment granting mandamus in *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 661 (1978).

The policies underlying these two fundamental principles of the law of mandamus have been reiterated by this Court. Of central concern has been the mischievous effect on judicial administration if interlocutory orders or rulings are reviewable in mandamus proceedings. Thus, in *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980), this Court said:

> Under the rationale employed by the Court of Appeals, any discretionary order, regardless of its interlocutory nature, may be subject to immediate appellate review. Such a rationale obviously encroaches on the conflicting policy against piecemeal review, and would leave that policy at the mercy of any court of appeals which chose to disregard it.

An important, related concern has been that the respondent in mandamus is the same district judge who is presiding over the litigation at the trial level. A procedure that places district courts on trial before appellate courts must be confined strictly to cases in which the district courts have exceeded their

authority. See *Kerr v. United States*, 426 U.S. 394, 402 (1976); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980).

Since World War II, in four major decisions, this Court reversed judgments of courts of appeals for improper issuance of writs of mandamus as a vehicle for appellate review. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943) (order striking certain pleas in abatement to a criminal antitrust indictment); *Will v. United States*, 389 U.S. 90 (1967) (order requiring government to provide information requested in a bill of particulars); *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978) (order deferring trial of a federal securities law complaint pending completion of state trial of related claim); and *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980) (order granting new trial in private antitrust action because of errors in evidentiary rulings). In three other significant cases, this Court affirmed lower court refusals to grant petitions for the writ. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953) (order in a private antitrust action granting severance of a defendant for lack of venue); *Kerr v. United States District Court*, 426 U.S. 394 (1976) (discovery order for production of documents); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) (order denying defendant's motion to stay or dismiss diversity action for breach of contract).[12] The few cases in which this Court has upheld the use of mandamus by courts of appeals are exceptional.[13]

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[12] *Gulfstream* was treated by the court of appeals as a § 1291 appeal under the collateral-order doctrine and, alternatively, as a petition for mandamus.

[13] In the last four decades, this Court has condoned the use of mandamus only in a few, extraordinary situations in which there was substantial question of district court *power*--and often of constitutional power--to issue a particular order. See, e.g., *Mallard v. United States District Court*, 490 U.S. 295 (1989) (order requiring unwilling attorney to represent indigent inmates in a civil proceedings); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) (remand order held to be beyond the authority

In the instant case, the district court certified a class for trial of two common issues of liability. Applying this Court's standards for determining the availability of mandamus to review such an order, three incontrovertible points should be noted. First, issuance of the certification order was well within the authority of the district court under Rule 23 of the Federal Rules of Civil Procedure. Since ruling on a motion to certify a class is not a usurpation of judicial power, the district judge plainly acted within his prescribed jurisdiction. Second, the certification order was not final even in the district court. The order was conditional and subject to modification at any time by the district court under Fed. R. Civ. P. 23(d). Third, defendants, if ultimately aggrieved by the certification order after trial and final judgment, enjoyed the right to appeal the district court's decision to the Seventh Circuit.

The clear import of this Court's mandamus decisions establishes that there was no basis for the court below to entertain the petition in this case. It allowed mandamus when the most that could be claimed is that the district court erred in a conditional ruling, subject to later modification, on a matter

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conferred by law); *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (order, purportedly based on Fed. R. Civ. P. 35, requiring civil defendant to submit to mental and physical examination); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) (order refusing demand for jury trial); *Hoffman v. Blaski*, 363 U.S. 335 (1960) (transfer of venue alleged (and held) to be beyond the authority conferred by law); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) (same as *Dairy Queen*); *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (order referring antitrust case to master for trial--an order described by this Court as an "abdication of the judicial function").

The present case does not remotely resemble any of these decisions, and indeed, with the exception of its mistaken reliance on *Beacon Theatres* and *Dairy Queen* (see p.17 n.17, *infra*), the majority below did not place significant reliance on any of them in justifying its resort to the writ of mandamus.

clearly within its jurisdiction.[14] The district court's order did not create an extraordinary situation that called for a drastic remedy. On the contrary, review was plainly ill-timed and premature.[15]

Although this Court has not previously considered whether class certification orders are reviewable in mandamus, this Court has determined--for reasons highly relevant in this proceeding--that such orders are not reviewable under the collateral-order doctrine. The rationale of *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), fully applies to review in the guise of mandamus. The order under review in *Coopers & Lybrand* was one decertifying a class. In reversing the court of appeals judgment allowing an appeal, this Court said:

> There are special rules relating to class actions and, to that extent, they are a special kind of litigation. Those rules do not, however, contain any unique provisions governing appeals. The appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation ....
>
> The finality requirement in § 1291 evidences a legislative judgment that "[restricting] appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170. (437 U.S. at 470-471)

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[14] As discussed below, on the record before the court of appeals, there was no basis for concluding that the trial judge had erred in any respect. See pp. 20-28, *infra*.

[15] This vital point was emphasized by Judge Grady in his opinion denying defendants' request for permission to take an interlocutory appeal under 28 U.S.C. § 1292(b). See Pet. App. 63a-64a.

The force of the final judgment rule that underlies *Coopers & Lybrand* applies equally to review in the form of mandamus. Whatever the mode of review, piecemeal appeals have a debilitating effect on judicial administration and violate the final judgment rule embodied in § 1291. As noted in *Coopers & Lybrand*, 437 U.S. at 474-475, Congress has provided a narrow exception for an interlocutory appeal when both the trial court and the court of appeals concur that prejudgment review is appropriate. Except in rare cases, review of interlocutory orders in the guise of a writ of mandamus circumvents the statute and is in conflict with this Court's decisions.

If the court below had followed the teachings of *Coopers & Lybrand* and the principles in this Court's long line of mandamus decisions, the petition for mandamus would have been summarily denied. To justify its determination that mandamus review was permissible, the Seventh Circuit misconstrued *Coopers & Lybrand* and reformulated the law of mandamus.

In the view of the lower court, the potential province of mandamus extends, in effect, to all interlocutory decisions that are not directly appealable under either §§ 1291 or 1292(b): any order within that province is subject to mandamus review if two conditions are met. Pet. App. 2a-3a.

The first of these conditions exists whenever, in the appellate court's judgment, the trial court's order would not be "effectively reviewable" after final judgment. Pet. App. 2a, 11a. The full meaning of this extraordinary proposition--and its conflict with *Coopers & Lybrand*--is revealed in the court of appeals' application of this condition. In an elaborate, purportedly factual analysis, made without the benefit of notice, pleading or evidence, the majority arrived at certain conclusions as to the economic benefits and risks of this particular class certification order for the corporate **defendants**, the assumed psychological pressures of the order

upon these defendants, and the strategic decisions these defendants would presumably be compelled to make, *i.e.*, they would be forced to settle the case. At the end of this convoluted chain of speculations, the court found that, if the defendants were to settle, there would be no "effective" right to appeal the certification order. Pet. App. 9a-11a.

In place of the principle that mandamus lies only when a trial court has exceeded its prescribed jurisdiction or otherwise taken some action beyond its judicial power, the lower court's second condition allows mandamus review even when a trial court has entered an order that was within its jurisdiction--an order that was plainly not a usurpation of judicial power--provided that, in the appellate court's judgment, the order was "usurpative in character." Pet. App. 3a, 11a. What made the order "usurpative in character" in this case, in the view of the court below, was the cumulation of what it called three "concerns" (Pet. App. 12a-21a).

> Concern # 1: Defendants would be better off economically if plaintiffs were compelled to pursue their cases separately than if the litigation were to proceed according to the district court's class certification order.
>
> Concern # 2: In a nationwide diversity class action, trial of the issue of defendants' breach of the duty of due care (the negligence issue determined to be common to the class) would require the trial judge to use improper legal standards because the applicable laws of the states are not the same.
>
> Concern # 3: If plaintiffs prevail, trial of the issue of defendants' breach of the duty of due care before one jury, followed by separate jury trials of other issues of liability and damages, would be "inconsistent with the principle that findings of one jury are not to be

reexamined by a second, or third, or nth jury." Pet. App. 19a.

None of these "concerns," singly or in combination, justifies extraordinary court of appeals intervention by writ of mandamus. Indeed, the second and third "concerns" are so premature--and flimsy--as to be nothing more than makeweights.[16] If and when the class action in the instant case ends in final judgment favorable to the plaintiff class, these latter "concerns" may be addressed, to the extent that they have substance, either on appeal from the judgment (assuming an appeal is taken), or in later trials (assuming there are later trials), when plaintiffs seek to rely on the preclusive effect of the judgment. Indeed, with respect to the third concern of the court below, the district court in its letter to counsel (Pet. App. 165a-168a) made clear it was prepared to try several typical cases to final judgment on all issues. Nothing in the law of mandamus justifies a court of appeals, on "concerns" of this kind, to order a district court to decertify a class.[17]

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[16] Petitioners contend that the "concerns" voiced by the court of appeals are wholly lacking in substance. See pp. 26-27, *infra*. National class actions in diversity cases of the kind contemplated by the district court in the instant case are now common in the federal system. District courts have been able to define threshold issues of liability based on underlying state law for the benefit of both plaintiffs and defendants in mass tort situations. Therefore, petitioner's third reason for grant of certiorari, pp. 20-28, *infra*, argues that, even if mandamus were available as a means of review, the court of appeals erred in its order to decertify the class. As to the third "concern" of the majority below, it recognized the well-settled procedures for bifurcated trials, including bifurcation with separate juries, but reached the premature--and unfounded--conclusion that those procedures would not work in this case.

[17] *Beacon Theatres v. Westover, supra*, and *Dairy Queen v. Wood, supra*, cited by the court below as authorities for issuing mandamus to deal with its third "concern," are inapposite. In those cases, the district courts had ordered nonjury trials of matters on which the Seventh Amendment guaranteed jury trial. In the instant case, the district court concededly intends to conduct a jury trial on all issues triable by jury. See also pp. 27-28 n.29 *infra*.

The gravamen of the mandamus issue as seen by Chief Judge Posner was the "concern" derived from an economic analysis purporting to compare the risks and benefits from proceeding as a class action with the risks and benefits of compelling hundreds or thousands of individual trials. The majority concluded that the benefits of separate trials, despite their costs to all parties and to the judicial system, outweighed the benefits of an initial trial on common issues of liability. In crude dollar terms, the court balanced these factors--from the perspective *only* of the corporate defendants. (The court's economic analysis here parallels its earlier analysis that the defendants would have no effective right of appeal since they would be compelled to settle if the class were not decertified.)

The court below simply invented the supposed amounts of defendants' ultimate liability under its two litigation scenarios. Pet. App. 9a-10a.[18] Moreover, even assuming for argument's sake that somehow the scope of mandamus may be measured solely from the perspective of defendants, the court below ignored the advantage *to the defendants* that would result if the class action were tried and jury verdicts in their favor were returned. This omission is all the more surprising given that, interspersed amid its guesses as to defendants' liability, the court injected its own legal prejudgment that plaintiffs' case has little or no merit. See Pet. App. 12a.

Appellate court prejudgment of a case, made without notice to the plaintiffs, without knowledge of the discovery that had been conducted, without inquiring into the proposed evidence that plaintiffs planned to adduce, without any test in the district court of the legal sufficiency of the facts by case dispositive motion--in short, without a semblance of process

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[18] The mandamus petition contained no allegation of facts as to the effect of class certification on the defendant manufacturers. The matter was suggested for the first time at oral argument. The economic and psychological analysis advanced by the majority is belied in defendants' publicly filed documents. See p. 7 n.10, *supra*.

that might be considered due process of law--is of course intolerable. This Court has rejected prejudgment of the merits of cases in class certification proceedings, even by trial courts. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). See pp. 26-27, *infra*. The impropriety of such prejudgment through appellate factfinding without benefit of any record is manifest.

The Seventh Circuit's grounds for entertaining a petition for mandamus flout the principles established by this Court. In a mandamus proceeding, an appellate court must first consider whether the petition raises a matter within the scope of mandamus. Second, if mandamus is available, the court must ask whether petitioners are entitled to relief. The first question goes to the power of the appellate court to act and is, in a sense, jurisdictional. The second goes to the merits of the lower court's action. The court of appeals below bootstrapped its conclusion that it had power to consider the petition for mandamus based upon its conclusion that the district court's class certification order was a mistake.

The Seventh Circuit has reformulated the law of mandamus to circumvent the statutory limitations on the timing of appeals. Immediate review of any interlocutory order would be possible if a court of appeals determined that the aggrieved party could not obtain "effective" relief--in the peculiar sense of the term adopted by the court below--after final judgment. If final-judgment review is deemed "ineffective"--for example, because of the possibility of voluntary settlement--mandamus is available.

The lower court's disregard of the basic principles that have defined the scope of mandamus and of the meaning of *Coopers & Lybrand* constitute an audacious expansion of appellate control. If interlocutory trial court orders are reviewable on mandamus on the grounds stated by the court below, the consequence for litigation and administration will be grave indeed. In its mandamus decisions, this Court has always been concerned with the harm to the federal system that

would result if mandamus were not confined to its proper place. These very harms would ensue if mandamus were to be available for premature appellate review of conditional case management decisions by district courts, in class actions or otherwise, on grounds of the kind used by the majority of the court below.

II. THE SEVENTH CIRCUIT'S DECISION TO ENTERTAIN THE PETITION FOR MANDAMUS CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS, WHICH HAVE REFUSED TO REVIEW CLASS CERTIFICATION ORDERS IN MANDAMUS.

The decision of the court below conflicts with the decisions of every other court of appeals that has ruled in a similar case. Class actions now regularly proceed with certifications of classes for phased trials, with the first phase limited to trial of issues of liability common to the class. Courts of appeals, in mandamus proceedings, have consistently sustained or refused to review such class certifications.[19] The decision of the court below stands in stark contrast to the views of other courts of appeals.

After district courts had certified Rule 23(b)(3) and (c)(4) limited issue classes, defendants sought mandamus to compel decertification in *Arthur Young & Co. v. U.S. District Court*, 549 F.2d 686 (CA9 1977); *American Crystal Sugar Co. v. United States District Court*, 559 F.2d 481 (CA9 1977); *In re Breast Implant Litigation*, No. 92-3420 (CA6, May 22, 1992) (Pet. App. 198a);[20] *In re Bausch & Lomb, Inc.*, No. 94-711 (CA11, Dec. 1, 1994) (Pet. App. 197a); and *Copley Pharmaceutical, Inc. v. Brimmer*, No. 95-8032 (CA10, May 31, 1995) (Pet. App. 169a). The courts of appeals in each of these cases refused to allow resort to mandamus proceedings to undo

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[19] See 16 Wright, Miller, Cooper & Gressman, Federal Practice and Procedure § 3935 (1977 and Supp. 1995).

[20] The district court order is published *sub nom. Dante v. Dow Corning Co.*, 143 F.R.D. 136 (S.D. Ohio 1992). After the denial of mandamus by the Sixth Circuit, this case was transferred to the District of Alabama.

certification orders closely resembling the order in the instant case.[21]

Arthur Young, decided shortly after this Court's decision in *Kerr v. United States District Court*, *supra*, follows the principles laid down in that case. In a case that raised a number of issues like those presented here, the Ninth Circuit concluded that the class certification order for phased trial of a limited set of issues should not be disturbed. The most recent court of appeals decision in conflict with the decision of the court below is that of the Tenth Circuit, which denied mandamus to decertify a class in a case very similar to this one. The District Court of Wyoming had certified a class for trial of common issues, and after the decision in the court below, the defendant in the Wyoming case asked the district court to decertify the class. The district court, relying on *Arthur Young* among other decisions, explicitly refused to follow the decision of the court below. Pet. App. 171a-196a. The defendant petitioned for mandamus, which the Tenth Circuit denied

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[21] To this group may be added three other circuits, the Third, Fourth, and Fifth, in which courts of appeals, in § 1292(b) appeals, have upheld class certification orders like that in the instant case. *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (CA5 1986); *In re School Asbestos Litigation*, 789 F.2d 996 (CA3), *cert. denied*, 479 U.S. 852 (1986); and *Central Wesleyan College v. Kaiser Gypsum Co.*, 6 F.3d 177 (CA4 1993). These courts affirmed the district courts' rulings in the context of appellate review. *A fortiori*, these courts, in mandamus proceedings, would not have ordered decertification, and would almost surely have declined to entertain the petition. Thus, the decision of the court below appears to conflict with the decisions of *seven* other circuits.

In those few cases in which mandamus has been held available to review class certification orders, serious questions of judicial authority were presented. See, *e.g.*, *In re Temple*, 851 F.2d 1269 (CA11 1988) (order certifying mandatory class with no opportunity to opt out); *In re Fibreboard Corp.*, 893 F.2d 706 (CA5 1990) (aspect of trial order calling for trial of damages claim under standard alleged (and found) to be inconsistent with governing law.) Whether or not these decisions are consistent with this Court's limitations on mandamus (in view of the possibility of review after final judgment), they raised questions of judicial authority not present here. (See pp. 26-27, *infra*.)

summarily. In a brief order, the Tenth Circuit said that it had reviewed the arguments and "the pertinent authorities" in arriving at its conclusion that mandamus was unavailable. Pet. App. 169a.

There is thus an intercircuit conflict on an issue of great importance to a large and growing body of complex cases in which courts have certified classes for the purpose of trial of common issues of liability.[22] The potential gains from such certifications are substantial. The Seventh Circuit's decision to use mandamus as a vehicle for premature review represents a cloud over this development that this Court should act promptly to remove. These important cases should be permitted to proceed in orderly fashion through the lower federal courts.

III. THE SEVENTH CIRCUIT'S DECISION TO ORDER DECERTIFICATION THREATENS TO UNDERMINE THE PROPER RELATIONSHIP BETWEEN TRIAL AND APPELLATE COURTS, HAS WIDE IMPLICATIONS FOR THE ADMINISTRATION OF JUSTICE, AND IS IN CONFLICT WITH DECISIONS OF THIS AND OTHER COURTS.

In this section, petitioners assume *arguendo* that mandamus was available to review the order certifying a voluntary class. The central issue is the application of Rule 23 of the Federal Rules of Civil Procedure.

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[22] The majority, while acknowledging a conflict with some appellate decisions in other circuits, seemed remarkably unaware of the extent to which class certification for trial of common issues has come to be accepted in federal litigation. Chief Judge Posner found that: "Most federal courts ... refuse to permit the use of the class-action device in mass-tort cases, even asbestos cases" (Pet. App. 21a), an account that is quite wrong if meant to describe the past decade.

The nature and method of interlocutory review used by the court below, and the substance of the court's determination, are in conflict with Rule 23 as interpreted by this Court and by other federal circuits, exceed the permissible bounds of mandamus review, and have wide implications for the administration of justice. If mandamus review of interlocutory class certification orders is to be permitted, it is imperative that this Court determine whether courts of appeals may direct class decertification for reasons such as those invoked by the court below.

In mass tort litigation, it has become commonplace for a federal district court to certify a voluntary class for the purpose of adjudicating issues common to the class.[23] Rule 23(c)(4)(A) specifically permits a class action to be maintained with respect to particular issues. District courts apply this rule as a methodology to manage cases in which plaintiffs number in the thousands or even millions. These cases would otherwise place an enormous strain on the federal judicial system. Proceeding in stages to resolve at the outset issues common to the class permits one trial of these issues rather than repeated litigation in countless separate trials. Until the decision of the court below, courts of appeals had regularly approved such limited-issue class certifications in interlocutory appeals and in mandamus proceedings.[24]

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[23] See, e.g., *In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, Nos. 94-1064, 94-1194, 94-1195, 94-1198-94-1202, 94-1203, 94-1207, 94-1208, 94-1219 (CA3 April 17, 1995), *petition for certiorari filed*, No. 94-2137.

[24] The leading cases in the courts of appeals are *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (CA5 1986); *In re School Asbestos Litig.*, 789 F.2d 996 (CA 3), cert. denied, 479 U.S. 852 (1986); and *Central Wesleyan College v. Kaiser Gypsum Co.*, 6 F.3d 177 (CA4 1977). These cases, which built upon the *Agent Orange* litigation, see *In re Diamond Shamrock Chemical Co.*, 725 F.2d 858 (CA2 1984) (mandamus proceeding), were all decided on interlocutory appeals certified under 28 U.S.C. § 1292(b).

See also the following mandamus decisions refusing to review

The nature and quality of mandamus review are functions of the fact that mandamus is an original proceeding in an appellate court. Mandamus cases commence whenever the petitioner elects to invoke the writ. The record basis for an appellate court's decision is the petition, the response, and the supporting documents; no record is certified from the district court.[25] Oral argument may or may not be allowed. The standard of review in mandamus must be consonant with the absence of a full record and the fact that the moving party has unfettered control over the moment at which some aspect of a judge's handling of an ongoing case is brought before the appellate court. Determining the scope of appellate review of a conditional trial court order, which remains subject to revision or rescission by the district court, is a daunting and important question.

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voluntary class certifications for limited-issue trials: *Arthur Young v. United States District Court*, 549 F.2d 686 (CA9 1977); *American Crystal Sugar Co. v. United States District Court*, 559 F.2d 481 (CA9 1977); *In re Breast Implant* Litigation, No. 92-3420 (CA6, May 22, 1992); In re *Bausch & Lomb, Inc.*, No. 94-7118 (CA11 Dec. 1, 1994); *Copley Pharmaceutical, Inc. v. Brimmer*, No. 95-8032 (CA10 May 31, 1995). The unreported decisions will be found in Pet. App. 171a, 197a, and 198a.

In addition, several other district courts have certified class actions for treatment of common issues in mass tort cases. E.g., *In re Estate of Ferdinand Marcos Human Rights Litigation*, MDL-840 (D. Hawaii, April 15, 1991); *In re Cordis Corp. Pacemaker Products Liability*, MDL-850 (S.D. Ohio, Dec. 23, 1992); *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58 (S.D. Ohio 1991).

A comprehensive review of the development of mass tort class actions is found in *In re A.H. Robins Co.*, 880 F.2d 709 (CA4), *cert. denied*, 493 U.S. 959 (1989); and see *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (CA6 1988). For an extensive analysis of the historical and policy considerations, see Henderson, et al., *Optimal Issue Separation in Modern Products Liability Litigation*, 73 Tex. L. Rev. 1653 (1995).

[25] In this respect, mandamus proceedings differ markedly from interlocutory appeal under § 1292(b) and, of course, from appeal after final judgment under § 1291.

Each of these elements of mandamus review was a significant factor in the decision of the court below. Defendants had requested the district court to allow a § 1292(b) interlocutory appeal of the class certification order, but the district court concluded that the question was not ripe for appellate review. Pet. App. 63a-64a. Before the district court had formulated a trial plan, (Pet. App. 167a), and in disregard of the district court's conclusion as to prematurity, defendants filed their petition for mandamus.

The court below entertained the petition and scheduled argument. At argument, the incompleteness of the court's actual knowledge, compared to what the court believed it should know of the case, became manifest. A question as to the nature of the judgments that would be entered on the issues certified was effectively laid to rest in a post-argument communication from the district judge.[26] Questions arose about three matters as to which the mandamus record provided no reliable information: (1) the strength of plaintiffs' case on the merits, (2) the manufacturers' litigation posture if the class certification order was sustained, and (3) the manufacturers' potential liability if a class action was prohibited. The majority proceeded to answer each of the questions with unfounded and improper speculation.

The majority presumed to prejudge the merits of the plaintiffs' case on the basis of unsupported assertions in the mandamus petition and concluded that there was a "great likelihood that the plaintiffs' claims, despite their human appeal, lack merit." Pet. App. 12a. The prejudgment not only

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[26] After oral argument, Judge Grady wrote counsel a letter regarding one possible trial plan he might follow. Pet. App. 165a-168a. The district judge's letter, forwarded to and accepted by the court below as the district judge's brief as respondent, was relied upon in the majority opinion, which concluded that the trial would result in an appealable final judgment. Pet. App. 8a.

lacks factual basis,[27] but violated legal standards of this Court, which preclude even trial courts from assessing the merits of cases in determining issues relating to class certification matters under Fed.R.Civ.P. 23. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), this Court declared:

> We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.

The court below squarely contravened the teaching of the *Eisen* decision.

On the question of defendants' litigation posture if the certification order were sustained, the court below engaged in the unwarranted speculation already discussed. See pp. 6-7, *supra*. The gross unreliability and irregularity of the "factfinding" by the court below makes its analysis and conclusions untenable. The court found "facts" without the

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[27] Indeed, just weeks ago, following a year-long study by the national Institute of Medicine ("IOM"), the IOM issued a report entitled *HIV and the Blood Supply: An Analysis of Crisis Decisionmaking*. (National Academy Press, Washington, D.C. 1995). That report concluded in pertinent part:

> In the Committee's judgment, heat treatment processes to prevent the transmission of hepatitis could have been developed before 1980, an advance that would have prevented many cases of AIDS in individuals with hemophilia. Report pp.4-13.

And in fact, the discovery already accomplished in the instant case has disclosed a massive amount of information (hundreds of thousands of documents and in excess of fifty depositions) which petitioners believe would wholly validate petitioners' "failure to heat treat" theory of liability, the theory identified by the district judge as "the core of plaintiffs' negligence claim." (Pet. App. 36a, 48a).

The court of appeals also ignored information in its possession that undermined its conclusion. One of the cases in which there had been a defendants' verdict had just been reversed by the Seventh Circuit and Judge Bauer, who joined in the majority opinion in the instant case, had served on the panel. *Gruca v. Alpha Therapeutic Corp.*, 51 F.3d 638 (CA7 1995).

benefit of notice, pleading, evidence, or any semblance of due process. The court's monetary projections were made solely from the perspective of the corporate defendants.[28] If mandamus review of a class certification order is available, the nature and quality of such review cannot be so ephemeral. Appellate review in the absence of a reliable factual record can be no better than arbitrary and capricious.

Not only did the court below engage in an arbitrary and capricious application of Rule 23, it also undertook a free-wheeling, inaccurate, and untimely analysis of the trial court's evolving trial plan and of the effect of certification on the defendants' jury trial rights.[29]

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[28] Strangely, as noted above (pp. 17-18, *supra*), the court below ignored the advantage to the defendants that would result if the class action were tried as certified and the jury returned verdicts in favor of the defendants. This omission is all the more surprising given that the court interspersed its monetary projections with its prejudgment that the plaintiffs' case lacks merit.

[29] First, the court below indicated that the district court was, in essence, planning to violate the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), by seeking to create a kind of federal "amalgam" of applicable state laws. See Pet. App. 13a-15a. This is simply not so. Rather, the trial court concluded that there was enough likelihood of similarity among the applicable state laws to warrant the enormous efficiency gains from a common trial--a conclusion that the court of appeals could not reject before the applicable laws and the jury instructions had been definitively determined. The trial court explicitly acknowledged that--while the chances were substantial that a common trial would be of value in most individual cases--it was nonetheless "possible that for reasons the court does not presently foresee, the verdict of the jury would not be usable for collateral purposes in a particular case or perhaps even in a particular jurisdiction." Pet. App. 60a.

Second, the court below indicated that a bifurcated trial of the issues --some before the class action jury and some in subsequent individual actions--would run counter to defendants' jury trial rights. But since all issues triable by jury *are* to be tried by jury in the class action, and since it is well recognized that bifurcated trials do not necessarily violate any party's jury trial right, this matter would arise only if and when a particular claim is made, in a subsequent trial, that the remaining individual issues cannot properly be considered apart from one or more of the common

Mandamus review must be conducted with due regard for the relationship between trial and appellate courts. Appellate courts must not thrust themselves indiscriminately into the trial process to review nonfinal orders that turn on the facts of a particular case. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). If mandamus review of nonfinal orders is permitted, an appellate court must make its decision on the record before the district court and defer appropriately to the broader knowledge of the district judge whose order is being reviewed. The mandamus proceeding in the court below did not meet these minimal standards.

The integrity of the federal judicial system is at risk if an order certifying a voluntary plaintiff class may be reviewed and set aside in the summary fashion of the court below. The nature and quality of the lower court's reversal of a class certification order is a matter of great importance on which this Court ought to speak.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

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issues. At that time, the presiding court will be free to consider the collateral estoppel effect of the class verdict in the light of any claim of a jury trial right. *Cf. Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931) (ordering that trial of liability issue be combined with trial of damages issue in second trial). The hypothetical examples of instances in which such a problem might arise in the present case, cited by the court below (Pet. App. 20a) are, at best, fanciful. See generally Henderson, et al., *Optimal Issue Separation in Modern Products Liability Litigation*, 73 Tex. L. Rev. 1653 (1995).

Respectfully submitted,

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